SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-11-0033
PETITION TO AMEND ER 3.8)
OF THE ARIZONA RULES OF)
PROFESSIONAL CONDUCT)
)
)
)
) FILED 08/28/2013

ORDER REOPENING FOR COMMENT RULE 42, ER 3.8, RULES OF THE SUPREME COURT

A petition having been filed proposing to amend Rule 42, ER 3.8, and comments having been received, upon consideration,

IT IS ORDERED that the attached amendments to Rule 42, ER 3.8 and 3.10, Rules of the Supreme Court, be reopened for comment until October 25, 2013.

DATED this day of Augu	ıst, 2013.
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REBECCA WHITE BERCH Chief Justice

TO:

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ATTACHMENT*

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) (f) [No change]
- (g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to the court in which the defendant was convicted and to the corresponding prosecutorial authority, and
 - (2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority,
 - (i) promptly disclose that evidence to the defendant's counsel or, if the defendant is not represented, to the defendant and a public defender office in the jurisdiction, and (ii) make reasonable efforts to inquire into the matter or to cause the appropriate law enforcement agency to undertake an investigation into the matter.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take appropriate steps, including giving notice to the victim, to set aside the conviction.

^{*} Additions to text are shown by underscoring; deletions by strikeouts.

(i) A prosecutor who concludes in good faith that information is not subject to subsections (g) or (h) of this Rule does not violate those subsections even if this conclusion is later determined to have been erroneous.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of ER 8.4.

* * *

Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the significance of the evidence was not appreciated by the trial prosecutor or prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed that was not available at the time of trial. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented

defendant must be made through defendant's counsel.

. . .

ER 3.10 Credible and Material Exculpatory Information about a Convicted Person

- (a) When a lawyer knows of credible and material evidence that creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the lawyer shall disclose that information to the court in which the defendant was convicted and the corresponding prosecutorial authority.
- (b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.
- (c) A lawyer who in good faith concludes that information is not subject to this Rule does not violate this Rule even if that conclusion is later determined to have been erroneous.
- (d) This Rule does not require disclosure if the lawyer knows that appropriate governmental authorities or the convicted defendant already possess the information.

Comment

Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. Because of the importance of these principles, this Rule applies to all members of the Bar except prosecutors, whose special duties with respect to disclosure of new, credible, and material exculpatory evidence after conviction are set forth in ER 3.8 (g), (h), and (i).